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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA MESSENGER

Ms. Magalie R. Salas
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, D.C. 20554

Re: *Ex Parte* Presentation; In the Matter of Annual Assessment of the Status of Competition in the Video Market for the Delivery of Video Programming; CS Docket No. 00-132

Dear Ms. Salas:

This is to notify the Commission that the Consumer Electronics Retailers Coalition has made a written *ex parte* communication to Donnajean Ward of the Cable Services Bureau in the above-mentioned proceeding.

In its Notice of Inquiry, the Commission asked commenters to provide information regarding the development of specifications for interoperable set-top boxes, including updated information on the progress of the OpenCable process. It also sought comment on the retail availability of navigation devices to consumers. CERC has responded to these questions in the context of the Commission's Further Notice of Proposed Rulemaking in the Navigation Device proceeding, CS Docket No. 97-80, and has provided Ms. Ward with a copy of these comments. CERC respectfully requests that the Commission consider the substance of its comments as it relates to the navigation device questions raised in the Notice of Inquiry.

In accordance with Section 1.1206 of the Federal Communications Commission rules, this letter and the attached written presentation are being provided to your office. A copy of this notice has also been delivered to Ms. Ward.

Very truly yours,

Catherine Krupka

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Enclosure

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 304 of the Telecommunications Act of 1996	)	CS Docket No. 97-80
	)	
	)	
Commercial Availability of Navigation Devices	)	

To: The Commission

Comments Of
Consumer Electronics Retailers Coalition

Best Buy Co., Inc.
Circuit City Stores, Inc.
RadioShack Corporation
Sears, Roebuck & Co.
International Mass Retail Association
National Retail Federation

November 15, 2000

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Before the
Federal Communications Commission
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Commercial Availability of Navigation Devices	)	

To: The Commission

Comments of the Consumer Electronics Retailers Coalition

The Consumer Electronics Retailers Coalition ("CERC") respectfully submits these comments in response to the September 18, 2000 Further Notice of Proposed Rule Making ("FNPRM" or "Further Notice") issued by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceeding.[1] CERC represents the competitive force that the Congress was determined to unleash through Section 304 of the 1996 Telecommunications Act.[2]

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[1] *In the Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, *Further Notice of Proposed Rulemaking and Declaratory Ruling* (Rel. Sept. 14, 2000)(the "*Navigation Device FNPRM*" or "*Navigation Device Declaratory Ruling*").

[2] CERC is comprised of the major U.S. retailers of Consumer Electronics ("CE") and Information Technology ("IT") products: Best Buy Co., Inc., of Minneapolis, Minnesota; Circuit City Stores, Inc., of Richmond, Virginia; RadioShack (formerly Tandy) Corporation, of Fort Worth, Texas; and Sears, Roebuck & Co., of Chicago, Illinois. CERC also includes major retail trade associations, the International Mass Retail Association ("IMRA") and the National Retail Federation ("NRF"). CERC and its individual members have participated actively in the Commission dockets affecting cable devices including: ET Docket 93-7 and PP Docket 00-67, as to "cable compatibility," and CS Docket 97-80 implementing Section 304.

INTRODUCTION AND SUMMARY

In this Further Notice, the Commission observes that while the cable industry has supported retail competition in some other areas, the July 1 date to support competitive navigation device entry has come and gone without any entry, or any on the near horizon. The Commission asks, why this "apparent disparity" between support for a retail market in cable modems, but not (despite congressional and FCC mandates) in navigation devices?[3] There are four basic answers:

> 1) Cable MSOs already "own" the market for navigation devices, whereas they must rely on retail competition to help establish a cable market for broadband data modems;
>
> 2) All cable modems are designed to a national standard, so there is no local advantage for MSO-provided devices with respect to interactivity, optimization for particular systems, or portability;
>
> 3) The FCC has not yet provided sufficient incentives for MSOs to acquiesce in a "level playing field" for competitive retail entrants, and
>
> 4) MSOs have been allowed to subsidize distribution of devices they market themselves, so as to erect barriers to potential competitive entry.

From the outset of the Congress's effort to bring competition to a market that has been closed for 50 years, it has been obvious that national technical standards were essential to competitive entry. Congress, in Section 304 itself, directed the Commission to act in consultation with private sector standards organizations.[4] The filings by retailers and others noted that there were three technical preconditions to a competitive, national market:

- a standard, national means of digital video transmission;
- a standard, national security interface; and

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[3] *Navigation Device FNPRM* ¶ 12.

[4] 47 U.S.C. § 549(a).

- a means of empowering nationally distributed navigation products, including DTV receivers, VCRs, PCs, etc., to support the features and functions of different local cable systems.[5]

Each of these is necessary, but – without the other two – not sufficient to support a competitive retail market in navigation devices. The first condition (standard transmission) was satisfied through the emergence of the MPEG transport stream as a *de facto* standard. The second became the object of that part of the OpenCable project devoted to a "POD" module and interface specification. The third necessary element, however – support of the actual functioning of retail navigation devices on cable systems – has suffered from inattention by CableLabs and MSOs, distraction by CE and IT manufacturers, and imprecision by the Commission. It has been primarily CERC members – the only entities with no alternative to competitive entry – that have focused on the fact that one of the essential elements to retail competition has been effectively relegated to afterthought status.

Cable entities have claimed, persistently, that their only obligation by July 1, 2000, was to have "POD" modules nominally available for use, irrespective of whether a single competitive entrant could make a navigation device, or a single MSO system was ready to support one.[6] They also explicitly disclaimed any responsibility to support a DTV receiver, or to support functionality of a box on more than a single cable system.[7]

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[5] *See, e.g.*, CEMA Navigation Device Comments at 8 (filed May 16, 1997); CERC Navigation Device Comments at Section II (filed May 16, 1997); Circuit City Navigation Device Comments at 5 (filed May 16, 1997); Tandy Navigation Device Comments at Section II.D (filed May 16, 1997); Zenith Navigation Device Comments at Section II (filed May 16, 1997).

[6] Letter to the Honorable William J. Tauzin, Chairman, Subcommittee on Telecommunications, Trade and Consumer Protection from Robert Sachs, President & Chief Executive Officer, Aug. 15, 2000 (the "NCTA Tauzin Letter").

[7] Cable Industry Status Report at 10 (filed July 7, 2000)(the "July 7, 2000 Status Report").

Manufacturers have been unable to obtain timely specifications or a license to make or distribute navigation devices that rely on POD modules. Meanwhile, they have been offered procurement contracts, dangled by MSOs, to help supply the millions of set-top digital cable devices that MSOs are now leasing to their digital customers, at rates subsidized by the leasing of analog boxes.[8]

The Commission has focused on deadlines for POD availability and integration, but has been less clear as to its expectations for MSO system support of the *operation* of the POD-enabled navigation devices themselves. It said repeatedly in its Report & Order, and on Reconsideration, that it expected navigation devices to be portable and nationally supported, but noted parenthetically that it did not have a *specific* expectation in this respect.[9] This aside has been seized upon by the cable industry to, effectively, circumvent the clear intentions of the Congress and the Commission.[10]

The Commission has declined repeatedly to move up the *2005* date, in the face of well-supported requests and compelling evidence, and has never spelled out exactly what its expectations are with respect to MSO obligations by that date. The cable industry's cavalier, narrow interpretation of its obligations to date shows that continued imprecision and undue patience by the Commission will frustrate the Congress's expectations. CERC sets forth in detail why this date needs to be moved to January 1, 2002, and supplies a precise, objective formulation of what would constitute a competitive "level playing field" by that date.

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[8] *See* Section II herein.

[9] *Navigation Device R&O* ¶ 49, 61, 66, 32; *Navigation Device Recon. Order* ¶ 48.

[10] July 7, 2000 Status Report at 10 & n.14.

CERC members are very pleased that the Commission has, we hope in recognition of the seriousness of these problems, launched such a comprehensive Year 2000 review. The August 2 CERC response to the cable industry's July 7 Status Report[11] focused only on the technical and licensing issues addressed by NCTA and the other signatories. ***The Commission's more comprehensive questions properly bring into play competition issues that are essential to there being any competitive entry at all.***

In Part II of this filing, CERC shows that the marketing practices of cable operators, like their collective approach to specifications and licensing, would, if continued, forestall competitive entry. It has become obvious that MSOs have been loading the expenses for digital navigation devices onto the bills of analog service customers for whom they face little or no competition. The ability to do so, unless checked by the Commission or equally available to competitive entrants, would likely result in 80% of this market being foreclosed to competitive entry by 2005.

The Commission has the power and mandate to address these practices under Section 304. Moreover, in Part I CERC demonstrates that the cable industry has definitively not complied with the responsibilities that it accepted in this proceeding to support the entry of its potential competitors. The sanction for such conduct, laid out by the Commission in this proceeding, is to bar MSOs from the navigation device market until they have fully supported competitors' right to attach. While CERC does not at this time request imposition of the full remedy, the availability of such a sanction further supports the Commission's power to impose

[11] Response of the Consumer Electronics Retailers Coalition to the July 7, 2000 Cable Industry Status Report (filed Aug. 2, 2000) ("CERC Status Report Response").

relief against subsidization and marketing practices that forestall competitive entry. ***Therefore, CERC requests that the Commission take the steps CERC proposes in Part II as a sanction for the conduct documented by CERC in Part I, as well as pursuant to its oversight powers under Section 304.***

In summary, despite the Commission's attempts to enforce legislation passed four years ago, CERC members are still unable to obtain a navigation device directly from a consumer electronics or information technology manufacturer. CERC seeks a "level playing field" ***technically and legally***, so that it can buy competitive devices not tied to particular MSO specifications, and, for such relief to be meaningful, ***economically***, so that the devices of entrenched competitors do not enjoy subsidies unavailable to CERC members.

I. A Level Playing Field, Technically and Legally, Must Be Established To Allow Competitive Entry As Intended By The Congress.

Congress was clear that private sector, technical specifications were the key to "assuring" equality of competitive opportunity through FCC regulations. Retailers seek the opportunity to utilize a common set of specifications by a date certain – rather than having the entrenched incumbents dictate separate, and inferior, specifications for competitive entrants.

A. The January 1, 2005 Date for Technical Equality Must be Moved Up to January 1, 2002

The Commission may have to report to the Congress that it has failed in its mandate to "assure" competitive commercial availability through its regulations, unless the FCC takes these steps on a priority basis to: (1) define, with precision, what constitutes a "level playing field" for competitive and MSO-provided devices, and (2) require such technical equality of opportunity by January 1, 2002. When

asked to do so in the past, the Commission has said it would revisit these questions based on progress, or lack thereof.[12] It is now well past July 1, 2000, and the progress meter stands at zero and is moving in the wrong direction. If the Commission does not act now, it will be too late to impose any but the most drastic remedy in the future.

1. There is overwhelming evidence that the cable industry has defaulted on its technical obligations to support competitive entry.

CERC incorporates by reference its comprehensive, August 2 reply to the July 7 NCTA "Status Report." The claim of successful "compliance" with July 1 obligations could be supported, in the Status Report, only through extraordinary argument that there were, in fact, no meaningful obligations, and that the FCC could not have really expected any meaningful results. NCTA and the co-signatories have made the following arguments in this and other documents:

- By July 1, 2000, the cable industry was required only to have digital PODs available for customers who have obtained digital "host" set-top boxes at retail stores.[13]
- The cable industry, however, was not required to adopt specifications, provide license agreements, or take the other steps necessary to allow consumers, as of July 1, 2000, to *actually obtain* such digital host set-top boxes from manufacturers and retailers.[14]
- By July 1, 2000, it was not necessary to assure that commercial host devices are portable.[15]
- By July 1, 2000, the cable industry was not required to adopt specifications for commercial devices that support the same features and

[12] *Navigation Device R&O* ¶ 69; *Navigation Device Recon. Order* ¶ 35.

[13] NCTA Tauzin Letter at 1.

[14] NCTA Tauzin Letter at 1-2.

[15] NCTA Tauzin Letter at 1-2.

functionality currently available through cable-provided navigation devices.[16]

- By July 1, 2000, CableLabs was not required to develop specifications for an integrated DTV set because the separation rules only apply to set-top boxes and because integrated DTV sets were not available in 1998.[17]
- CableLabs only had to comply with the milestones specified in the initial CableLabs work plan (rejected by the FCC) rather than the actual implementation timetable set by the FCC.[18]
- CableLabs is not accountable, anyway, under the navigation device rules, because it is not an MSO.[19]

The cable industry filings then blamed the victim. They claimed that some manufacturer (only one has claimed to be licensed to support a POD module – Scientific Atlanta, as of June 30) made an "offer," prior to July 1, to provide such a non-functional product for retail sale, but was rebuffed because greedy retailers sought to "extract from cable operators a portion of the operators' revenues...."[20]

As the CERC August 2 filing shows, the situation is even worse than the NCTA rhetoric suggests: there are real doubts as to whether the few PODs that exist to date[21] would actually work reliably even with the sort of hobbled, useless product that NCTA claims such a POD, and MSO systems, would support.[22]

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[16] For example, NCTA takes the position that the specifications only have to support the features and functions available in cable boxes as of the date of the Navigation Device R&O. July 7, 2000 Status Report at 9.

[17] July 7, 2000 Status Report at 10.

[18] July 7, 2000 Status Report at 4. NCTA reported that "the milestones specified in the initial CableLabs/OpenCable work plan, employed by the Commission as the framework for establishing accelerated timetable for implementation of the digital separation requirement, have been achieved...." *Id.* This is not the same as reporting that the cable industry actually complied with the law or with FCC regulations. *However, the dates proposed in the CableLabs work plan have also, now, come and gone, and compliance is not materially closer.*

[19] NCTA Equipment Compatibility Comments at 21.

[20] NCTA Tauzin Letter at 2.

[21] CERC believes that if the FCC were to ask how many PODs are in MSO possession to date, the answer would be that no system in the country has even a half dozen.

[22] CERC Status Report Response at 4-5.

In its original Navigation Device Report & Order, the Commission ordered the cable industry to develop specifications that would allow new entrants to place technically comparable, competitive navigation devices on retail shelves by the 2000 holiday season. To achieve this goal, the cable industry should have:

- Made fully tested PODs actually available.[23]
- Adopted specifications with enough "lead time" to allow manufacturers and retailers to make and sell host devices that actually work with PODs.
- Provided manufacturers with a license to build products that accept PODs – not just a draft with undefined terms.
- Assured that specifications provided for functional parity with MSO-provided devices.

The cable industry was required to submit regular status reports to keep the agency apprised of the progress being made towards developing standards, implementing certification processes, and other requirements affecting the commercial availability of navigation devices.[24] The status reports were supposed to be detailed, including anticipated compliance dates.[25] Any changes were to be "reported promptly."[26]

As CERC proved at length in its Response to the Status Report, the FCC's expectations were not nearly so minimal as NCTA claims. The Commission expected implementation "promptly and in good faith,"[27] and said repeatedly that

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[23] NCTA reported that "cable operators were able to take delivery of digital POD modules by July 1, 2000 to meet consumer demand." July 7, 2000 Status Report at 5. However, as NCTA well knew, this number was close to zero because there was zero consumer demand, because no manufacturer had received a timely specification or license. This was artful language, indeed, rather than a candid report of actual status. The Status Report did acknowledge that the (few) POD models now in existence have "bugs" that are still being worked out – so it is questionable of what use they might have been, had any host devices been commercially available. July 7, 2000 Status Report at 5.

[24] *Navigation Device R&O* ¶ 81.

[25] *Id.*

[26] *Id.*

[27] *Id.* ¶ 13.

retailable navigation devices need to be and should be portable.[28] The Commission needs to be definitive and unambiguous on this point, immediately.

2. Specific regulation of cable industry technical practices has not worked.

In forming its navigation device order and regulations, the Commission declared a "right to attach,"[29] and accepted the cable industry's offer, through CableLabs, to take care of the specifications and licenses necessary to support full and vigorous competition.[30] CEA sought reconsideration on the basis that the incumbent monopolists should not have sole control over the conditions for competitive entry, and asserted the necessity of moving the 2005 date up to July 1, 2000.[31] Others, such as Circuit City, while supporting the necessity of moving up the date for technical parity, argued that some business interest had to be directly responsible for compliance, and subject to definitive *sanction* for non-compliance, and this had to be the cable industry. [32]

Now, months after July 1, 2000, the cable industry must bear the responsibility that came with its discretion. The time has come either for sanctions, or for a clear way forward that will actually *assure* full and equal competitive opportunity, or – if necessary – both.

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[28] *Id.* ¶¶ 13, 49, 61, 66, 132; *Navigation Device Recon. Order* ¶ 48. *See* discussion CERC Status Report Response at 7-9.

[29] *Navigation Device R&O* ¶ 29; 47 C.F.R.§ 76.1201.

[30] *Navigation Device R&O* ¶ 75-81; *Navigation Device Recon. Order* ¶ 41.

[31] CEMA Petition for Reconsideration at 2.

[32] *See* Circuit City Recon. Opposition at Section VI (Filed Sept. 23, 1998); Opposition of Tandy Corp. at Section III. Circuit City and Tandy supported the CEA plea to move up the 2005 date.

a) No penalties have been assessed for the technical defaults to date.

Thus far, the cable industry has been allowed to profit by its evasion of FCC regulations. The hybrid POD waivers provide a good example.[33] The cable industry knew about its obligation to comply with the hybrid POD rule, failed to act in a timely fashion to address the lack of PODs, filed last minute waiver requests, and then suggested that their noncompliance was immaterial because retailers had not ordered commercial host devices for such PODs. While the Cable Services Bureau[34] acknowledged that the applicants were solely responsible for their predicament, waiver applicants suffered no repercussions for failing to comply with the rules.[35]

The industry did not even acknowledge, through any waiver application, its *larger failure to meet its July 1 obligations as to digital devices, as well.*[36] Thus, in the absence of effective FCC oversight, it would fall to retailers – the only commercial interests entirely dependent on successful implementation of the navigation device rules – to move for sanctions against the distribution of digital

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[33] *See In the Matter of Charter, et al., Petition for Waiver from Requirement to Provide Point of Deployment Modules Contained in Section 76.1204 of the Commissions Rules,* Memorandum Opinion & Order (Rel. Aug. 15, 2000)(the "*Waiver MO&O*").

[34] *In the Matter of Charter, et al., Petition for Waiver from Requirement to Provide Point of Deployment Modules Contained in Section 76.1204 of the Commissions Rules,* Order ¶ 3-4 (Rel. June 30, 2000)(the "*Forbearance Order*").

[35] This failure is particularly significant for those companies that filed their waiver petitions so late as to have not been covered by the Cable Services Bureau's forbearance order. Compare *Forbearance Order* with *Waiver MO&O.* These companies violated Commission rules despite the ultimate waiver grants, yet still no agency enforcement action has been taken.

[36] *See* Opposition of Circuit City Stores, Inc., *In the Matter of Petition for Waiver from Requirement to Provide Point of Deployment Modules,* CSR 5558-Z (filed July 6, 2000); *In the Matter of Petition for Waiver from Requirement to Provide Point of Deployment Modules and Petition for Waiver from Requirement to Provide Point of Deployment Modules,* CSR 5545-Z and CSR 5548-Z (filed May 22, 2000) *GCI Petition for Waiver from Requirement to Provide Point of Deployment Modules,* CSR 5564-Z; *Cablevision Petition for Waiver from Requirement to Provide Point of Deployment Modules,* CSR 5566-Z; *Adelphia Petition for Waiver from Requirement to Provide Point of Deployment Modules,* CSR 5567-Z; *Mediacom Petition for Waiver from Requirement to Provide Point of Deployment Modules,* CSR 5569-Z; *CableAmerica Petition for Waiver from Requirement to Provide Point of Deployment Modules,* CSR 5570-Z; *Time Warner Petition for Waiver from Requirement to Provide Point of Deployment Modules,* CSR 5572-Z (filed July 20, 2000).

devices by MSOs. This option must now be considered seriously by all concerned with competition, and with the integrity of FCC regulations.

b) Banning all distribution of MSO products until obligations have been complied with should be considered only as a last resort.

The Commission has said that if the cable industry fails to meet its responsibilities, which includes those related to developing all POD and other specifications needed to create a competitive market, it would prevent system operators from providing integrated set-top boxes.[37] As the non-compliance period drags on, months past July 1, this option must be taken very seriously.

Retailers have supported a positive, rather than negative, approach to the Commission's oversight of its regulations, focusing on incentive rather than punishment. At this late stage, however, powerful means are required to get the cable industry's attention. The most effective would be an FCC order prohibiting MSO distribution of navigation devices until a "level playing field" has been established. However, CERC believes that the technical aspects of noncompliance can still be addressed by establishing a date certain for a level playing field, and defining such a state with adequate force and precision that future evasion will not be possible.[38] But time is running short.

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[37] *See Navigation Device R&O* ¶ 62.

[38] CERC also believes, however, that part of the remedy for noncompliance, and other industry practices that have stalled competitive entry, may be restrictions on leasing practices. See Part II, below.

3. Rather than relying only on subjective regulation of conduct, the Commission should simply establish that devices distributed by MSOs to consumers must operate according to whatever technical specifications MSOs provide for the products of their competitors.

So long as the obligations on cable operators are expressed subjectively, as behavioral goals, "noncompliance" will remain controversial to determine, and difficult to punish. The Commission is, and should be, reluctant to administer industry behavior in subjective and prescriptive terms. Clearly, its efforts at doing so with respect to navigation devices have failed thus far. Setting clear and objective goals, by dates certain, must be more satisfactory than interventionist regulation of specific behavior.

A simple answer is at hand. Cable operators who provide devices to consumers should support them according to whatever technical standards they establish for their competitors.[39] Whatever specifications are finalized to describe a product as "OpenCable compliant" – as to portability, support for interactive features and functions, etc. – should govern "MSO" and competitive boxes alike. *No function or feature, with respect to receipt of any service offered by an MSO, should be available on one but not the other.* The choice is between more intrusive regulation, or a simple, clear, statement with respect to private sector specifications.

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[39] In theory, if such specifications provided for "integrated" security, they would meet this test, *so long as* retail entrants have access to the same specifications, at the same times, with the same marketing discretion, that their MSO competitors have, and products can be ordered directly and independently from manufacturers, in accordance only with OpenCable specifications, without specific reference to any particular MSO system or systems. Such a result, however, would require a change in Commission rules, which require separate security modules – based on continued insistence by MSOs that *they* must have a say over any physical distribution of digital security circuitry. We assume that such a change at this late date would cause too much delay.

4. The date (currently set at January 1, 2005) for full compliance by MSO-provided devices with OpenCable specifications should be clearly and specifically established as the date on which MSO-provided devices must rely on the same technology as is afforded to competitive entrants.

As competitive entry into the market for devices with navigation functionality remains stalled, the target for equality of competitive opportunity recedes further over the horizon. Cable operators have embraced the retailer goal of building various digital functionalities into navigation device products – but for their *own* products, *not* for competitive entrants. Set-top boxes on order by cable MSOs are implementing video-on-demand,[40] time-shifting,[41] interactive television, EPGs, e-mail, e-commerce,[42] MP3 downloading, games, telephony, and other consumer electronics and information features. As MSOs announce more and more multi-purpose products, they have boasted that they are pre-empting competition.[43]

It was clear, when Congress passed Section 304, that digital storage, communication, and other features were going to be combined with navigation products. The question was, would such convergence occur in an open market, or only in the domain of products specified and ordered by MSOs? Congress explicitly intended the former, but the Commission's patience has produced the latter.

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[40] *Cox Launches VOD in San Diego*, Multichannel News (Sept. 25, 2000)(using Scientific-Atlanta Explorer 2000 boxes); *Cox Now Offers "Movies on Demand,"* Multichannel News (Oct. 2, 2000).

[41] *S-A to Support Time-Shifting*, Multichannel News (Aug. 30, 2000) (noting that personal video recording could be an "even more compelling" service when integrated into a set-top box instead of as a stand-alone device); *S-A Ships New Explorer 2100 Digital Boxes*, Multichannel News (Oct. 30, 2000).

[42] *S-A Lands Big Gear Order from Adelphia*, Multichannel News (June 5, 2000).

[43] Michael Rigas, Executive Vice President of Operations, Adelphia Communications, said that S-A boxes allow Adelphia "to be more aggressive in penetrating [its] systems with new digital interactive services." *S-A Lands Big Gear Order from Adelphia*, Multichannel News (June 5, 2000). Scientific-Atlanta also says that a cable system's ability to offer advanced interactivity, VOD, high-quality digital sound and video allows operators to "generate revenues and conquer the competition." Subscriber Products Product Family Overview <www.sciatl.com/content/prd/sub_overview.htm>.

So long as MSOs are free to keep two sets of specification books – one for themselves, and one for their competitors – their self-interest will cause them to persist in putting obstacles or conditions on competitive entry, and adding favors and advantages for their own products. For the FCC to regulate MSO business practices so as to compel daily practices that the MSO otherwise would resist would be highly intrusive, unnecessarily regulatory, and likely to fail. **A common set of specifications for incumbents and entrants is much sounder regulatory policy.**

5. To enable competitive entry, the date for such compliance by MSO-provided devices with OpenCable specifications must be moved up to January 1, 2002.

CableLabs representatives, though disclaiming any legal obligation to do so, have insisted that they will provide a "middleware" specification, by the third or fourth quarter of 2001, that will support both portability and interactivity for competitive entrant devices. Though overdue, such an accomplishment would be a major step forward. With much of the market already foreclosed,[44] however, retailers cannot rely on a mere projection. What the Commission needs to accomplish in this respect is to provide clear and unambiguous incentives for the cable industry to accomplish this objective in a meaningful way: first, the cable industry needs an incentive to *implement* "middleware" on time. Second, the industry needs an incentive to *support* the middleware solution, through MSO software applications and testing, so that the *actual functioning of competitive*

[44] Mike Farrell, *Comcast Raises New Service Forecasts*, Multichannel News (Nov. 13, 2000); *NCTA: New Services Surged in 3Q*; Multichannel News (Nov. 13, 2000); *Charter's Digital Subs Sour*, Multichannel News (Nov. 2, 2000); Matt Stump, *Allen's MSO Takes Digital Lead*, Multichannel News (Oct. 16, 2000); Jeff Baumgartner, *AT&T Books Philips Order, Breaks Digital-Box Ranks*, Multichannel News (Aug. 21, 2000).

devices on each MSO's system will be equal to that of MSO-provided products. Moving the "level playing field" date up to January 1, 2002 would accomplish both objectives.

The history of the "middleware" project, as documented in previous filings, has been one of low priority, delay, and, at times, paralysis. While CERC and its members applaud the recent positive steps announced by CableLabs,[45] this program is still extremely vulnerable to further delay, or ultimate frustration, unless support for it becomes a higher priority with MSOs and their traditional suppliers. The sooner MSO-provided devices must *also* rely on these OpenCable specifications, the sooner the FCC, interested parties, and the public can be assured that such specifications will be finalized, tested, and fully supported.

The requirements of testing and support by MSOs should not be underestimated. Establishing a specification, though extremely difficult to date, is only part of the job. The entire idea of "middleware" is that each MSO would be able to download software to a navigation device, to configure it for its particular system. Absent a requirement of a level technical playing field, *an MSO would be free to fail to support "competitive" devices, by providing no such application, or applications that provide for operation inferior to that of the devices it distributes itself.* The only assurance the Commission can have that this will not be the case is a requirement that the MSO-provided and competitive devices depend on the same software applications.

MSO cooperation in testing is also vital. If retailers are, as the Congress expected, to sell DTV receivers with built-in navigation capability, they and their

customers must have compelling assurance that these receivers will work on every cable system in whose service area the consumer may live or move. This will require intense and committed testing.

The Commission needs to be absolutely clear that the obligation to provide a level playing field, and avoid favoritism for MSO-devices, applies to *every* cable system – not just those that chose to sign the NCTA's "POD" letter to the FCC. Section 304 is not an optional provision. It requires FCC regulations to assure commercial availability as to navigation devices for *any* service provided to consumers by *any* MVPD. The Commission has, for present purposes, excluded from this category only DBS operators, whose systems already support national portability and technical equality between retail and MVPD-provided devices.

Since, as CableLabs has reported, a system promising technical equality will be available before 2001 is over, there is no reason for the FCC to wait until 2005 to require equality. To the contrary, the market for navigation devices may be largely foreclosed to retailers if the Commission were to wait so long. Retailers in such case might have no choice other than to seek the most serious sanctions for MSO non-compliance.

6. There are immediate steps that CableLabs could take to allow competitive devices to gain some foothold in the marketplace.

In addition to the steps necessary, as discussed above, to solve the long-term problem of discrimination against competitive devices, there are relatively simple steps that CableLabs and MSOs could take, within a few months, to facilitate market entry by competitive devices that offer some, but not all, of the features

[45] *See, e.g.*, Leslie Ellis, *Middleware: Over the OS, Under the Apps*, Multichannel News (Oct. 2,

that MSO-distributed devices provide now. Thus far, CableLabs has segregated its OpenCable specifications into a "unidirectional" specification that supports neither interactivity nor true portability,[46] and a "bidirectional" specification that would support both, but which remains incomplete and inoperative until the "middleware" element has been finished, tested, and supported through specific MSO applications. There are steps that could be taken quickly, however, to give immediate value to the "bidirectional" specification:

- **Signal Information ("SI").** Current PODs and specifications do not even assure that a competitively sourced POD/navigation device combination would allow a viewer to determine viewing options without scrolling through every channel to see what is on. This is a basic and essential capability included in every navigation device distributed by every MSO. Relatively simple OpenCable refinements, already proposed by manufacturers, would allow this information to be presented as to both present and future programs. This would make a device usable for passive viewing, and would be necessary, though not sufficient, for ordering pay-per-view programming.

- **Impulse Pay-Per-View ("IPPV").** The handful of PODs produced thus far do not make any provision to support consumer ordering of pay-per-view programming. This is a capability possessed by every digital MSO navigation device. A modest POD specification enhancement, also already proposed by manufacturers, would support such "IPPV" functionality. There are indications that cable industry supplier Motorola/GI will support testing of such functionality in its POD designs. The other POD supplier, however, Scientific Atlanta, has indicated that it is not prepared to support even this step toward equal functionality.

- **Electronic Program Guides ("EPG").** The relatively simple SI and IPPV enhancements would still be of limited utility to the consumer unless reliable EPG information could also be provided. Progress by NCTA and CEA in sorting out this issue in their February 22 joint letter to the Commission was quite limited. The rights of consumers to "assurance" of competition under Section 304 should not be held hostage to disputes over this issue. The Commission needs to obtain assurance that there will be a reliable way for consumers to receive this information.

2000); Jeff Baumgartner, *Rivals to Craft ITV Spec*, Multichannel News (Sept. 18, 2000).

[46] Passive channel tuning and descrambling features may, subject to further development and testing, prove to be portable, but without any way to provide the sort of "guide" information, as to what is on each channel, that all MSO-provided devices already have.

- **Video On Demand ("VOD").** Further enhancements to the current POD and host specifications would support consumer receipt of VOD programming (but – until the middleware solution is implemented – none of the more advanced interactive services available on devices now being distributed by MSOs). With such relatively minor enhancements, consumers could avail themselves of such features as "pause," "rewind," etc. that they can now enjoy with MSO-distributed devices.

In short, the division of the OpenCable specifications into "unidirectional" and "bidirectional" elements, and the extensive discussion of the necessary, final middleware solution, have served as distractions away from the fact that the existing specification is tantalizingly close to being useful for supporting manufacture and operation of a limited range of retailable competitive entrant products – for example, a DTV receiver for consumers not interested in the full range of interactivity, or a set-top device for the "second" or "third" receiver in a home.

CERC wishes to be perfectly clear that its customers are entitled to, and will settle for no less than, ***full technical equality*** for competitive retail products. The marginal and immediate improvements outlined above will *not* achieve such equality. However, the specifications and PODs available today are not, but could be, useful to consumers. The expectation of full equality should not serve as an excuse for CableLabs, MSOs, and their industry suppliers to deliberately stop *just short* of providing PODs and specifications around which it would actually be possible to design products of some value to consumers.

B. A License Allowing Competitive Manufacturers to Enter the Market Must be Extended Immediately.

The cable industry was required to be ready to support competitive entry by July 1, 2000; it was aware of this date since June, 1998. Yet a production license

needed to allow new entrants into the market has not yet been made available to manufacturers in other than draft form. CableLabs has provided an interim license, but it allows only production of test samples. The license version submitted to the Commission on October 18, pursuant to Commission order, requires adherence to "compliance" and "robustness" rules, but leaves these provisions blank. It is, in this respect, emblematic of the empty promise of competitive availability of navigation devices, and the hollow claims of "compliance" with the July 1 deadline.

1. Failure by the cable industry to complete the DFAST/PHI license by July 1, 2000 should not be considered acceptable by the Commission.

Just as the cable industry had a responsibility to adopt specifications to support the commercial availability of digital and hybrid host devices, it also had a responsibility to finalize and secure industry agreement on the terms of the license needed to allow manufacturers to make and sell such devices to retailers. This responsibility should have been completed no later than July 1, 2000.[47] The Commission must take immediate steps to mitigate the consumer harm that results as competitive devices continue to be withheld from the marketplace.

2. Manufacturers need to be licensed to manufacture, sell and distribute products immediately.

Consumer choice depends on competitive host device availability. Unfortunately, host device production and sale must be licensed through CableLabs to avoid violating a Motorola patent. The right to attach should not be withheld pending resolution of the current dispute over "compliance," "robustness," and other license issues. Indeed, Motorola has made it clear that it is not a party to

[47] More precisely, it should have been completed early enough to allow, with adequate lead time for design, specification, manufacture, and distribution, products to reach retail shelves by July 1, 2000.

these disputes (hence its request for change of the license name, from "DFAST" to "PHI.")

CableLabs' failure to license production does not arise from any dispute over intellectual property of the licensor. The Commission should require that a production license be granted with the same terms as the present, interim "development" license, and that any products marketed under this interim license be "grandfathered" with respect to the eventual terms of the final production license.

3. The positions of motion picture companies and technology licensors do not represent the entire range of views that CableLabs needs to consider in proposing a final license.

In industry consultations since the September 18 Declaratory Order, CableLabs has tried to walk a line between the demands of the MPAA and its members, and the concerns of other entities. In searching for compromise, it has tried to model provisions on those drafted during negotiations between the DTLA licensors of a particular copy control technology, and motion picture companies.

It should be clearly understood that, while the items under negotiation between DTLA and movie companies are useful guides in some respects, in others they address circumstances and situations different from those that apply to the PHI license. It should be remembered that the DTLA companies explicitly have approached that negotiation as technology licensors, not manufacturers. While DTLA has expressed concern over the interests of their "adopter" manufacturer licensees of DTCP technology, DTLA has *not* purported, in the DTLA or PHI negotiations, to represent its members' interests, or anyone else's, as PHI manufacturer licensees.

The two circumstances are by no means equivalent. For example, in the PHI case, but not the DTLA case, the issue over "deresolution" of component analog outputs may concern a consumer's right to view a signal over the *only* possible interface available for the receiver he or she has already purchased. The issue in the PHI context is markedly different from (but thus far often confused with) the similar question, in the DTLA context, of control over an *additional,* non-1394 output from a DTCP-enabled set-top hooked up to a (future) 1394 and DTCP-enabled receiver. In the DTLA case, it may be assumed that the consumer owns, or will have the option of acquiring, a DTV receiver with a 1394, DTCP-protected interface. In such case the consumer would not lose his or her only path to viewing HDTV programming over cable. However, in the case of the PHI license, the consumer who already owns a legacy HD or HD-Ready receiver, with only component analog inputs, has no other way to view HD programming over cable.

4. The FCC should not accept constraints on authorized consumer viewing as an allowable "copy control" limitation.

CERC does not believe that cutting off or disabling HD resolution is fair to the consumer. Nor should cutting off a *viewing* right over a downstream interface, for purposes related to, but not implementing, copy protection, qualify as either a licensing limitation in aid of conditional access, under FCC regulations, or as an "allowable" copy control measure under the FCC's September 18 Declaratory Order. Nor should the PHI result be dictated by existing license agreements between content providers and multichannel video program distributors. These vary as to parties, scope, periods, and provisions.

CERC sees little evidence that copying from full-bandwidth, component analog outputs can even be considered a reasonable threat. Losses are inevitable in reformatting the image for digital recording. No products configured for such recording purpose have been announced. And if they do appear, copies from a down-res'd image and copies as converted from an HD image would not seem sufficiently (if at all) different to justify disappointing clear and legitimate consumer expectations as to viewing HD programming over cable. A far better approach would be to proceed with measures to apply copy protection, subject to reasonable encoding rules, by means of hidden data.

5. Limitations including "allowable" copy protection constraints should be defined by reasonable and balanced encoding rules.

Encoding rule protections for consumers are present in the compliance rules of the DTLA "adopter" license. As to this issue, the analogy between the DTLA and PHI licenses is clear and direct. The effect of failure to include encoding rules in the PHI license would extend beyond possible conflict with the DTLA result (where the two overlap). It would extend to "source" and "sink" interfaces beyond the DTLA realm. For example, a PHI-licensed device with a hard-drive recording function but no active DTCP interface could have a never-copy rule imposed on it for any and all programming. Similarly, in the event of a future means of protecting downstream interfaces other than 1394/DTCP, there would be no assurance of comparable encoding rules.

Neither CableLabs nor the Commission should be distracted by arguments that encoding rules cannot be included in the PHI license on the supposed basis that content providers, whose conduct the rules may affect, are not "parties" to the

license. The license clearly contemplates, and MPAA and its members have emphasized, that motion picture content providers are to be third party beneficiaries, and therefore key parties, to the license. Indeed, CableLabs has been candid in stating, in the supporting text for drafts of this license, that virtually all impetus for "compliance" and "robustness" rules has come from MPAA and its members. Simple equity requires that, as in the case of the DTCP license, a power to impose limitations must be accompanied by mutuality, in favor of device functionality and customary consumer conduct. In its declaratory ruling, the Commission emphasized that only "allowable" copy protection terms could be included in the (PHI) license.[48] The Digital Millennium Copyright Act[49] provides a contemporary model of the "allowable" reach of copy protection, as formulated by the Congress only two years ago. The DMCA imposes very limited equipment design obligations[50] with an equally clear statement that consumer electronics and information technology product manufacturers are not under any additional requirements in designing new devices other than to follow Section 1201(k).[51]

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[48] *Navigation Device Declaratory Ruling* ¶ 29.

[49] Pub. L. No. 105-304, 112 Stat. 2860 (1998).

[50] 17 U.S.C. § 1201(k).

[51] Section 1201(c)(3) of the DMCA provides:

(3) Nothing in this section shall require that the design of, or design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure, so long as such part or component, or the product in which such part or component is integrated, does not otherwise fall within the prohibitions of subsection (a)(2) or (b)(1).

The legislative history is equally compelling. Chairman Tauzin said:

> Members of my Subcommittee included an unambiguous no mandate provision out of concern that someone might try to use this bill as a basis for filing a lawsuit to stop legitimate new products from coming to market. It was our strong belief that product manufacturers should remain free to design and produce digital consumer electronics, telecommunications, and computing products without the threat of incurring liability for their design decisions. Had the bill been read to require that new digital products respond to any technological protection measure that any copyright owners chose to deploy, manufacturers would have been confronted with difficult, perhaps even impossible, design choices. They could have been forced to choose, for example,

Moreover, Section 1201(k) sets forth encoding restrictions that clearly describe the circumstances in which such copy control technologies do and do not apply.[52]

II. A Level Economic Playing Field Is Essential To Competitive Entry

Even if competitive entrants finally do obtain a level technical playing field, they face inequitable and pre-emptive economic hurdles. The Commission has asked what other factors are impeding or affecting the creation of a commercial navigation device market.[53] A level competitive playing field is, perhaps, *the* most important long-term consideration of all.

In Part I, CERC demonstrated that the cable industry has dramatically failed to live up to the clear expectations and responsibilities imposed on it by the Commission in this proceeding. The steps CERC advocates in Part II, addressing the cable industry's own distribution practices for navigation devices, provide the industry one last opportunity to create the conditions necessary for competition in the navigation device market. If the measures fail, the Commission will be fully justified in imposing regulatory measures pursuant to the Report & Order in this

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> between implementing one of two incompatible digital technological measures. It was the wrong thing to do for consumers and thus, we fixed the problem.

Statement of Representative W.J. Tauzin, Cong. Rec. E2144 (daily ed. Oct 13, 1998). Senator Ashcroft noted that:

> I had been very concerned that S. 2037 could be interpreted as a mandate on product manufacturers to design products so as to affirmatively respond to or accommodate technological protection measures that copyright owners might use to deny access to or the copying of their works. To address this potential problem, I authored an amendment providing that nothing in the bill required that the design of, or design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological protection measure. The amendment reflected my belief that product manufacturers should remain free to design and produce the best, most advanced consumer electronics, telecommunications, and computing products without the threat of incurring liability for their design decisions. Creative engineers--not risk-averse lawyers--should be principally responsible for product design.

Statement of Senator John Ashcroft, Cong. Rec. S11887-88 (daily ed. Oct. 8, 1998).

[52] *Id.* § 1201(k)(2).

[53] *Navigation Device FNPRM* ¶ 13.